Supreme Court, U.S.
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No. 02-185

In The

Supreme Court of the United States

In Re: WALTER JAMES RHEAMS, appearing through his duly qualified curator, HELEN RHEAMS, TAMMY RHEAMS, individually, JAMILAH MONET RHEAMS through ALISHA MONIQUE THOMAS, and MR. and MRS. CECIL HARPER,

Petitioners,

v.

OFFICER VICTOR MARLER, OFFICER JASON POE, S.A. LARRY JONES, SHERIFF WILLIE GRAVES, UNITED STATES OF AMERICA, and UNITED NATIONAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

In addition to the parties listed by Petitioners, an additional party warrants mention. Victor Marler, one of the arresting officers in the arrest at issue in this litigation, is alleged to have been employed by the Tri-Parish Task Force (hereinafter referred to as "the Task Force"). The lawsuit alleges that Officer Marler had a history of complaints of police brutality filed against him and was unfit for the job but the Task Force nevertheless hired him with full knowledge of his background and that the Task Force was on notice that Officer Marler would be involved in a wrongful shooting incident much like the one in dispute in these proceedings. The lawsuit further alleges that the Task Force lacked authority to make an arrest outside of its jurisdiction and that Officer Marler was unsupervised.

Notwithstanding these allegations of wrongdoing made against the Task Force, the lawsuit does not name the Task Force as a party to the litigation. The Task Force is a necessary party to the present proceedings for two reasons. First, a subpoena duces tecum was served on the Task Force at the outset of the litigation to produce reports, records, and statements relating to the Rheams arrest. The Task Force filed a motion to quash asserting that the subpoenaed records are privileged from production. Prior to ruling on the motion to quash, the court stayed all discovery in the action. Subsequently, the district court dismissed the lawsuit in its entirety, thereby rendering the subpoena moot. The Task Force has an interest in upholding the dismissal of this action so that it will not have to comply with the subpoena served on it.

PARTIES TO THE PROCEEDINGS – Continued

Secondly, and more pertinent, the Task Force was served with the March 14, 2002 Order issued by the district court directing the parties to file memoranda as to whether *Heck v. Humphrey* applies under the facts of the present case. In compliance with this Order, the Task Force submitted a memorandum of authorities on the issue. The Task Force was the only party to argue that *Heck* applies to this lawsuit and requires that the action be dismissed. Consistent with the argument advanced by the Task Force, the district court dismissed the action. Petitioners served the Task Force with the Petition for Writ of Mandamus filed with the Fifth Circuit Court of Appeals, as well as with the Notice of Appeal. The Task Force was also served with the Petition for Writ of Certiorari filed in these proceedings.

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CITATION OF ORDER UNDER REVIEW

The opinion from which Petitioners seek certiorari is an unpublished opinion of the United States Fifth Circuit Court of Appeals filed on April 16, 2002 in the following captioned proceedings:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30340

In Re: HELEN RHEAMS, on behalf of Walter James Rheams; TAMMY RHEAMS; ALISHA MONIQUE THOMAS, on behalf of Jamilah Monet Rheams; CECIL HARPER; UNKNOWN HARPER, Mrs., Petitioners

The Opinion is reproduced in Petitioners' Appendix to their Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Honorable Court should decline the exercise of its supervisory jurisdiction as Petitioners have failed to cite any compelling reasons for doing so as required by Rule 10 of the Rules of the Supreme Court of the United States. Rule 10 also mandates that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The United States Court of Appeals for the Fifth Circuit properly denied Petitioners' Petition for Writ of Mandamus and properly denied Petitioners' petition for rehearing *en banc*. Petitioners now ask this Court to make those same factual and legal determinations that the Court of Appeals made.

STATEMENT OF THE CASE

The present litigation arises out of the attempted arrest and shooting of Walter J. Rheams ("Rheams") by law enforcement officers on September 21, 2000. Livingston Parish Deputy Sheriff Victor Marler and Louisiana State Trooper Jason Poe went to the Torrey Pines Trailer Park in Baton Rouge, Louisiana, on that date to arrest Rheams pursuant to a bench warrant issued a week earlier on charges of attempted second degree murder. In the course of executing the warrant, Rheams attempted to run down Deputy Marler and Trooper Poe with his vehicle. Acting in self-defense, the officers shot Rheams. A bullet struck Rheams in the back of his neck, severing his spinal cord. Due to his injury, Rheams is paralyzed from the neck down and can breathe only with the assistance of a ventilator.

Detective Leonardo Moore, the East Baton Rouge Parish Sheriff's Office Detective who investigated the incident, submitted a sworn warrant application to Judge Carl A. Guidry of the Nineteenth Judicial District for the Parish of East Baton Rouge on September 22, 2000. Judge Guidry issued an arrest warrant against Rheams on two (2) counts of attempted first degree murder. Rheams was arrested later the same day at the Summit Hospital where he was being treated for injuries sustained in the shooting and placed in custodial arrest of the hospital.

Rheams asserted pressure on the East Baton Rouge Parish District Attorney's Office to bring criminal charges against Officers Marler and Poe. To this end, the District Attorney's Office presented the case against the officers to the East Baton Rouge Parish Grand Jury on December 7, 2000. The Grand Jury returned a no true bill on the

charges, clearing the officers of any criminal wrongdoing. The District Attorney's Office issued a bill of information against Rheams on October 16, 2001, charging him with two (2) counts of attempted first degree murder.

Plaintiffs filed their Petition for Damages in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, on November 1, 2000. According to the allegations of the Petition, the officers lacked probable cause to arrest Rheams and had only a bench warrant for failure to appear in a domestic matter. The Petition further alleges that the officers ambushed Rheams and shot him for no reason. The state action was timely removed to the United States District Court for the Middle District of Louisiana.

Rheams moved to have the criminal charges against him dismissed on the basis that his medical condition prohibits him from effectively assisting his counsel at trial. To this end, he filed a motion for appointment of sanity commission. In support of this motion, Rheams submitted a letter from his treating physician confirming his paralysis, his dependence on a mechanical ventilator, and his minimal vocal capacity. The matter was presented to the court on June 12, 2002. Based on the medical report, the state court held the prosecution in abeyance until such time as Rheams becomes capable of assisting in his defense and scheduled a status conference on January 3, 2003 to monitor his condition. The court minutes are reproduced in Appendix C to the Petition for Writ of Certiorari.[1]

[1] The capacity hearing was conducted after the federal district court dismissed the civil action, and therefore, the court minutes are not a

(Continued on following page)

In the meantime, by Order issued on March 14, 2002, the federal district court ordered the parties to file written memoranda to address the issue of whether the rule established in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), applies under the circumstances of the present action. In compliance with the district court's Order, Respondent, the Tri-Parish Task Force, filed a memorandum addressing the issue. In its memorandum, the Tri-Parish Task Force argued that, under the authority of *Heck v. Humphrey*, the pending criminal charges require that the civil litigation be dismissed. By Order entered on April 1, 2002, the trial court held that *Heck* applies and dismissed the civil action. Alternatively, the court found that if *Heck* does not apply, the case should be stayed pending the outcome of the criminal proceedings.

On April 3, 2002, Petitioners applied to the United States Court of Appeals for the Fifth Circuit for a writ of mandamus pursuant to 28 U.S.C. § 1651. By opinion issued on April 16, 2002, the Fifth Circuit denied the writ application, affirming the trial court's ruling that the case is governed by *Heck*. Petitioners filed a petition for rehearing *en banc*, which was denied on May 28, 2002. In the meantime, Petitioners appealed the order of dismissal on

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part of the trial record in this litigation. An appellate court may not consider evidence which is not part of the record, nor can it receive evidence to supplement the record. *New Haven Inclusion Cases*, 399 U.S. 392, 450 n. 66, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1970); *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S.Ct. 673, 86 L.Ed. 951 (1942); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 486 n. 3, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986); *In re Brogna*, 589 F.2d 24, 27 n. 3 (1st Cir. 1978); *United States v. Febus*, 218 F.3d 784, 795 (7th Cir. 2000).

April 11, 2002. The appeal is presently pending in the United States Fifth Circuit Court of Appeals. Petitioners filed their Petition for Writ of Certiorari in the present proceedings on July 30, 2002.

SUMMARY OF ARGUMENT

A writ of mandamus is an extraordinary remedy. Mandamus is generally appropriate only when the lower court has exceeded its jurisdiction or has declined to exercise it, or when the court has so clearly and indisputably abused its discretion as to compel prompt intervention by the higher court. In order to prevail on a petition for writ of mandamus, a petitioner must show that his right to the writ is clear and undisputable. The decision of a district court to defer to a related state action is discretionary. As such, the right of the litigant to proceed in the federal action under such circumstances cannot be said to be clear and indisputable.

In the present action, criminal charges are pending against Rheams relating to his September 21, 2000 confrontation with the police. District Judge Polozola's decision to dismiss the federal action pending the resolution of the criminal charges was well within his discretion. Accordingly, mandamus is not appropriate under the circumstances.

In addition to applying to the Fifth Circuit for a writ of mandamus, Petitioners filed an appeal. The Notice of Appeal is reproduced in the Appendix to this Brief. The object of both the mandamus and appellate proceedings is the order dismissing the action. A litigant may not use mandamus proceedings as a substitute for appeal.

In any event, the ruling of the district court, as affirmed by the Fifth Circuit, is correct. Petitioners argue that the *Heck* rule applies only when there has been a conviction and does apply when criminal charges are merely pending. While the plaintiff in *Heck* admittedly had been convicted, this Court remarked that dismissal of a civil rights action would be appropriate where "some other bar to the suit" exists, offering as an example of such a bar the scenario where "a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action." 512 U.S. at 487 & n. 6. The *Heck* court clearly envisioned the dismissal of a civil rights action where criminal charges are pending against the plaintiff.

Petitioners further argue that the *Heck* rule applies only when the civil plaintiff has been charged (and convicted) with resisting arrest and does not apply when the plaintiff is charged with attempted murder. This argument lacks merit. The petitioner in *Heck* was charged with manslaughter, not resisting arrest. The pertinent inquiry under *Heck* is whether the civil suit challenges the validity of the criminal proceedings. Because self-defense serves as a valid defense to the offense of attempted murder under Louisiana criminal law, Rheams' excessive force claim implicates the validity of the attempted murder charges pending against him.

This action is also subject to dismissal under state law concepts of issue and claim preclusion. The *Heck* court expressly recognized the potential application of state preclusion law as a bar to federal civil litigation:

> We also decline to pursue, without implying the nonexistence of, another issue, suggested by the Court of Appeals' statement that, if petitioner's

> conviction were proper, this suit would in all likelihood be barred by res judicata. The res judicata effect of state-court decisions in § 1983 actions is a matter of state law.

Heck, 512 U.S. at 480 n. 2. A federal court must apply state law principles of preclusion. Under Louisiana law, the determination of probable cause in the course of criminal proceedings bars a related civil action for false arrest. For this reason, the findings of probable cause in the criminal proceedings against Rheams bar Petitioners' claims of false arrest and excessive force in this litigation.

The Bill of Information filed against Rheams, in and of itself, is fatal to the action. Under state law, the filing of a bill of information is prima facie evidence of probable cause, which may be rebutted by evidence that the bill of information was obtained by fraud, perjury, or other corrupt means. There are no such allegations in Petitioners' lawsuit. Moreover, the chain of causation for false arrest is broken by the return of an indictment, unless it can be shown that the deliberations of the grand jury or the district attorney were in some way tainted by fraudulent and corrupt practices of the defendant. There are no allegations of such improprieties made in the present lawsuit.

ARGUMENT AND AUTHORITIES

I. THE APPELLATE COURT PROPERLY DENIED THE PETITION FOR WRIT OF MANDAMUS

The writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations. *Kerr v. United States District Court,* 426 U.S. 394, 96 S.Ct. 2119, 48

L.Ed.2d 725 (1976). The federal courts have traditionally used the writ only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. Mandamus is reserved for those situations in which the trial court has exceeded its jurisdiction or has declined to exercise it or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court. *United States v. Mulderig,* 120 F.3d 534 (5th Cir. 1997); *Marinechance Shipping Ltd. v. Sebastian*, 143 F.3d 216 (5th Cir. 1998). In accordance with this historic practice, this Honorable Court has held that only exceptional circumstances amounting to a judicial usurpation of power will justify issuance of the writ of mandamus. *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).

A party seeking issuance of the writ must have no other adequate means to obtain the relief he desires and must satisfy the burden of showing that his right to the writ is clear and indisputable. *Conrad v. Colorado*, 28 Fed. Appx. 789 (10th Cir. 2001); *Gold v. Johns-Manville Sales Corp,* 723 F.2d 1068 (3rd Cir. 1983) (mandamus not available merely as a result of difficulties associated with proceeding to trial). Where an appellate court has before it both an appeal and a petition for mandamus and the order sought to be reviewed is properly reviewable by way of appeal, the appellate court must review the order through appeal rather than mandamus. *In re Kozeny,* 236 F.3d 615 (10th Cir. 2000). In other words, the avenues of appeal and mandamus are mutually exclusive, and thus, if an appeal is proper, mandamus may not be used as a substitute for appeal, "even though hardship may result from delay."

Bankers Life & Cas. Co. v Holland, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 2d 106 (1953); *Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 8 n. 6, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (citing *Hines v. D'Artois*, 531 F.2d 726, 732 n. 10 (5th Cir. 1976)). *See also Lamb v. Principi*, 284 F.3d 1378 (Fed. Cir. 2002); *A-Cos Leasing Corp. v. Ingraham*, 408 F.2d 492 (5th Cir. 1969).

When there is substantive litigation pending in both the state and federal courts, the decision of the district court to defer the action to the state court is largely committed to the discretion of the district court. Where a matter is committed to the discretion of the court, it cannot be said that a litigant's right to the matter is "clear and indisputable." Accordingly, Petitioners' right to proceed with their action in federal court is not clear and indisputable.

Throughout this litigation, Petitioners complain that the civil proceedings must proceed in an expedited fashion and without delay because of Rheams' precarious health condition. According to Petitioners, the only way the criminal charges will be resolved, which in turn will reactivate the civil action, is by Rheams' death. The potential death of a litigant prior to the conclusion of litigation is not a risk unique to the present litigation. This hardship is routinely faced by litigants, especially in complex litigation. This Court responded to a similar argument in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 98 S.Ct. 2552, 57 L. Ed.2d 504 (1978), as follows: "[T]he delay in adjudicating [the litigation] is simply a product of the normal excessive load of business in the District Court." 437 U.S. at 667, 98 S.Ct. at 2559, 57 L.Ed.2d at 514. *See also Kmart Corp. v. Aronds*, 123 F.3d 297 (5th Cir. 1997)

(federal civil RICO case stayed indefinitely pending resolution of related criminal matter).

II. *HECK* REQUIRES THAT AN ACTION FOR FALSE ARREST BE DISMISSED WHILE CRIMINAL CHARGES ARISING OUT OF THE ARREST ARE PENDING

In *Heck*, this Court held that an action which challenges the validity of a conviction or sentence must be dismissed until such time as the conviction or sentence is reversed or set aside. Petitioners argue that this rule is limited strictly to instances where there has been a conviction and does not apply when criminal charges are merely pending. Petitioners' argument lacks merit.

In *Heck*, this Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, *or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid*, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. . . . But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of *some other bar to the suit*.

512 U.S. at 486-87, 114 S.Ct. 2364, 129 L.Ed.2d 383. As an example of a damages suit "for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," the Court described the following:

> An example of this [ ] category – a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful – would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a lawful arrest. He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concerning res judicata, [] the § 1983 action will not lie.

Id. at 486 n. 6. As an example of "some other bar to the suit," this Court noted: "if a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings." *Id.* at 487 n. 8 (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)).

The Louisiana code defines first-degree murder in part as: "When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman, [or] peace officer . . . or when the specific intent to kill or to inflict great bodily harm is directly related to the victim's status

as a fireman, peace officer, or civilian employee." LSA-R.S. 14:30(2). The Louisiana code defines attempt as follows: "Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose." LSA-R.S. 14:27(A).

To succeed on excessive force claim under 42 U.S.C. § 1983, a plaintiff bears the burden of showing: "(1) an injury (2) which resulted directly and only from the use of force that was excessive to the need and (3) the force used was objectively unreasonable." *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001) (citations and internal quotation marks omitted). "It is well settled that if a law enforcement officer uses excessive force in the course of making an arrest, the Fourth Amendment guarantee against unreasonable seizure is implicated." *Harper v. Harris County, Tex.*, 21 F.3d 597, 600 (5th Cir. 1994) (citation omitted).

Under the Louisiana code, self-defense serves as a valid defense to the offense of attempted murder. Because of this defense, a conviction on charges of attempted murder is inconsistent with a claim that the officers used excessive force in making the arrest. For this reason, Rheams's excessive force claim would challenge the validity of the attempted murder conviction if he were convicted.

The United States Court of Appeals for the Fifth Circuit applied Louisiana law to bar a claim for excessive force where the plaintiff was convicted of battery of a

police officer in *Hudson v. Hughes,* 98 F.3d 868 (5th Cir. 1996):

> Hudson was arrested and convicted of battery of an officer. In Louisiana, self-defense is a justification defense to the crime of battery of an officer. *See* LSA-R.S. 14:19; *Louisiana v. Blancaneaux*, 535 So.2d 1341 (La. App. 1988) (discussing justification defense to battery of officer conviction). To make out a justification defense, the criminal defendant charged with battery of an officer must show that his use of force against an officer was both reasonable and necessary to prevent a forcible offense against himself. *Blancaneaux*, 535 So.2d at 1342. Because self-defense is a justification defense to the crime of battery of an officer, Hudson's claim that Officers Defillo, Hingle, and Lanasa used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer. This is true because the question whether the police applied reasonable force in arresting him depends in part on the degree of his resistance, which in turn will place in issue whether his resistance (the basis of his conviction for assaulting a police officer) was justified, which, if it were, necessarily undermines that conviction. We conclude therefore that to the extent that Hudson seeks to recover from the City of New Orleans and Officers Defillo, Hingle, and Lanasa for the defendants' alleged use of excessive force during his arrest, his § 1983 action may not proceed.

Hudson, supra at 873 (footnotes omitted). This holding is in line with the caselaw of the majority of jurisdictions which holds that a conviction on charges of resisting arrest or battery of a police officer bars an action for false arrest

and excessive force. *See Simmons v. O'Brien*, 77 F.3d 1093 (8th Cir. 1996); *Franklin v. County of Riverside*, 971 F.Supp. 1332 (C.D. Cal. 1997) (§ 1983 claim of excessive force implied invalidity of plaintiff's convictions for obstruction of a peace officer and assault on a peace officer and thus were barred under *Heck*); *Crooms v. P.O. Mercado, No. 41*, 955 F.Supp. 985, 988 (N.D. Ill. 1997) ("*Heck* bars [the plaintiff's] § 1983 action because a successful prosecution of his § 1983 claim would necessarily imply that his criminal conviction for resisting a police officer was wrongful."); *Gray v. Farley*, 13 F.3d 142 (4th Cir. 1993) (collateral estoppel barred inmate's § 1983 excessive force claim where issue of whether inmate had been beaten and his confession coerced had been tried in suppression hearing in state court); *Nelson v. Jashurek*, 109 F.3d 142 (3rd Cir. 1997); *Jones v. City of St. Louis*, 92 F.Supp.2d 949 (E.D. Mo. 2000) (conviction for assault of police officer conclusively established reasonableness of force used by police); *Holder v. Ivanjack*, 93 F.Supp.2d 933 (N.D. Ill. 2000) (arrestee's claim of excessive force necessarily implied invalidity of conviction for resisting a police officer).

Petitioners attempt to distinguish the jurisprudence cited above by pointing out that Rheams has been charged with attempted first degree murder, not resisting arrest or battery of an officer. In other words, Rheams' attempt to run over the officers is not related to the officers' attempts to apprehend and subdue him. Accordingly, Petitioners argue, even a conviction on the attempted murder charges would have no bearing on the present civil action.

The courts have upheld the use of deadly force by the police and dismissed claims of excessive force based on *Heck*. In *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000),

rehearing en banc denied, 216 F.3d 1081 (5th Cir. 2000), and *Sappington v. Bartee,* 195 F.3d 234 (5th Cir. 1999), the Fifth Circuit held that an excessive force claim under § 1983 is barred as a matter of law if brought by an individual convicted of aggravated assault arising out of the same occurrence. In *Hainze*, a police officer shot a suspect two times in the chest who was 4-6 feet away from him and holding a knife. Thus, as in *Hainze* and *Sappington*, the force used by Deputy Marler and Trooper Poe to restrain Rheams, up to and including deadly force, cannot be deemed excessive.

III. PETITIONERS' CLAIMS OF FALSE ARREST AND EXCESSIVE FORCE ARE BARRED UNDER STATE LAW PRINCIPLES OF RES JUDICATA, COLLATERAL ESTOPPEL, AND ISSUE PRECLUSION

This Court recognized in *Heck* the potential application of state preclusion concepts as a bar to § 1983 actions:

> We also decline to pursue, without implying the nonexistence of, another issue, suggested by the Court of Appeals' statement that, if petitioner's conviction were proper, this suit would in all likelihood be barred by res judicata. The res judicata effect of state-court decisions in § 1983 actions is a matter of state law.

Heck, 512 U.S. at 480 n. 2 (citation and internal quotations omitted). The Court again referred to the application of res judicata later in the opinion: "Regardless of the state law concerning res judicata, see n. 2, *supra*, the § 1983 action will not lie." *Id.* at 486 n. 6.

Matters determined in a state court proceeding are entitled to the same preclusive effect in a subsequent federal suit as they enjoy in the state where the decision was rendered. "[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), this Court stated:

> Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.

449 U.S. at 96. *See also McCoy v. Hernandez*, 203 F.3d 371, 374 (5th Cir. 2000). In *Allen*, *supra*, this Court held that an arrestee's civil rights action against the police was barred under state law where the existence of probable cause for the arrest had previously been determined in the state criminal proceedings. Accordingly, in this litigation, the preclusive effect of the previous determinations of probable cause for Rheams' arrest are governed by Louisiana law.

In connection with the arrest of Rheams, two separate sets of arrest warrants were issued. Deputy Marler and Trooper Poe acted pursuant to an attempted murder warrant at the time of their confrontation with Rheams. While in the process of executing the warrant, Rheams attempted to run over the officers with his vehicle. Judge

Guidry issued an Arrest Warrant against Rheams on two counts of attempted first degree murder. Additionally, the East Baton Rouge Parish District Attorney's Office filed a bill of information against Rheams on October 16, 2001, charging him with two counts of attempted first degree murder. Similarly the Grand Jury cleared the officers of wrongdoing in connection with the shooting by returning a no true bill. Respondent respectfully submits that the finding of probable cause by Judge Guidry in conjunction with his issuance of the Arrest Warrant and the determination of probable cause by the District Attorney's Office in conjunction with the filing of the Bill of Information and the return of a no true bill against the officers by the Grand Jury are binding in these proceedings and bar and preclude Petitioners' claims of false arrest and excessive force.

Courts throughout the country have recently been faced with the issue of what effect, if any, a finding of probable cause in a criminal proceeding has on a subsequent civil action for false arrest, false imprisonment, or malicious prosecution. A vast majority of the courts have ruled that **the determination of the existence of probable cause in a criminal proceeding**, either as a result of a conviction or as a result of a motion to suppress or a motion for preliminary examination, **is binding in a civil action and bars and precludes a civil claim for false arrest/imprisonment and malicious prosecution**. Some courts dismiss the civil claim on the grounds of res judicata, issue preclusion, or collateral estoppel. Other courts base their dismissal on the fact that the plaintiff has no cause of action for false arrest where there has been a prior determination of probable cause, ruling that the absence of probable cause is a necessary element of

such a claim. Other courts take an evidentiary approach to the resolution of the issue by holding that the prior determination of probable cause in the criminal proceedings is "conclusive proof" as to the existence of probable cause in the civil proceedings.

The underlying rationale of either of these approaches is that where the question of probable cause has been determined in the criminal proceedings, the civil court should not "second guess" the findings of the criminal court, which was in a much better position to assess and determine whether probable cause existed. The relevant jurisprudence on this issue is explored in the following pages of this Memorandum.

The jurisprudence is clear that a finding of guilt in a criminal proceeding, whether by trial or plea, constitutes an **absolute defense** to an action for false arrest on the charges. *Heck v. Humphrey; Krueger v. Reimer*, 66 F.3d 75 (5th Cir. 1995); *Wells v. Bonner*, 45 F.3d 90 (5th Cir. 1995); *Restrepo v. Fortunato*, 556 So.2d 1362 (La. App. 5th Cir. 1990), *writ denied,* 560 So.2d 11 (La. 1990); *Williams v. DiVittoria*, 777 F.Supp. 1332 (E.D. La. 1991); *Dukes v. State of New York*, 743 F.Supp. 1037 (S.D.N.Y. 1990); *Grochowski v. Commonwealth of Virginia,* 741 F.Supp. 1230 (W.D. Va. 1990); *O'Leary v. Luongo*, 692 F.Supp. 893 (N.D. Ill. 1988).

A **conviction** on the charges, however, **is not a necessary prerequisite** in order for the criminal proceedings to have a preclusive effect in the civil proceedings. Something less than a final judgment of conviction may operate as an absolute bar to the plaintiff's false arrest claim on the charges. For example, in *Courtney v. Rice*, 546 N.E.2d 461 (Ohio App. 1988), the court held that

a conviction of the plaintiff constituted an absolute defense to claims of false arrest, **even though the conviction was subsequently reversed on appeal.** A similar result was reached in *Losee v. Dearinger*, 911 F.2d 48 (8th Cir. 1990), and *Elbrader v. Blevins*, 757 F.Supp. 1174 (D. Kan. 1991).

A finding of probable cause in an **interlocutory ruling** also serves as an absolute defense to a false arrest claim. *Williams v. DiVittoria*, *supra*; *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42 (2nd Cir. 1985); *Terrones v. Allen*, 680 F.Supp. 1483 (D. Colo. 1988). In *Zanghi*, *supra*, George Zanghi was arrested for driving while intoxicated, and his driver's license was temporarily suspended. Under New York Vehicle and Traffic Law, a driver charged with driving while intoxicated may have his license temporarily suspended immediately, followed by an administrative hearing to be held within fifteen (15) days of arraignment to determine if revocation of the license for six (6) months should be imposed. At Zanghi's administrative hearing, the administrative law judge found that there were reasonable grounds to arrest Zanghi for driving while intoxicated and therefore revoked Zanghi's driver's license for six (6) months. Zanghi was ultimately **acquitted by a jury** on the drunken driving charges and instituted a false arrest action against the arresting officers and the police department. Despite the fact that Zanghi was **found innocent** of the drunken driving charges, the court dismissed the false arrest claims based on res judicata.

In *Terrones v. Allen*, *supra*, Terrones, like Zanghi, was arrested for driving while intoxicated, and his driver's license was temporarily suspended at the time of his arrest. At his license revocation hearing, the hearing

officer found that probable cause existed for the arrest and revoked Terrones' driving privileges for a period of one (1) year. The district attorney's office admitted that the breath alcohol test administered to Terrones had been obtained as a result of an unlawful stop and detention and dismissed the drunken driving charges due to the lack of admissible evidence. In Terrones' subsequent civil action for false arrest, the court gave res judicata effect to the hearing officer's finding of probable cause and dismissed the civil action even though Terrones was **not convicted** on the charges. *See also Hugar v. Nigro*, 616 N.Y.S.2d 833 (A.D. 4 Dept. 1994) (administrative determination that plaintiff violated traffic law conclusive proof for plaintiff's arrest and detention).

Several courts have had the opportunity to specifically address the issue of whether a finding of probable cause in a **preliminary examination hearing** bars a subsequent civil claim, even though the charges are ultimately dismissed or the criminal defendant is acquitted. In *Hubbert v. City of Moore, Oklahoma*, 923 F.2d 769 (10th Cir. 1991), probable cause for the arrest of a woman for assault with a dangerous weapon was found at her preliminary hearing. However, the woman was later **acquitted** after a jury trial. She then filed a civil rights lawsuit against the arresting officers for false arrest without probable cause. The Tenth Circuit ruled that it had been **conclusively** determined at the preliminary hearing that the officers had probable cause to make the arrest and they were therefore entitled to qualified immunity from liability. *See also, Haupt v. Dillard*, 17 F.3d 285, 289-90 (9th Cir. 1994); *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir. 1987); *Smith v. Thornburg*, 136 F.3d 1070 (6th Cir. 1998).

In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), an arrestee sought to suppress certain evidence against him on the ground that it had been obtained in violation of the Fourth Amendment. The court denied the motion to suppress. The arrestee then brought a § 1983 suit in federal court against the arresting officers. This Court held the suit barred by collateral estoppel because the issue of a Fourth Amendment violation had been resolved against the plaintiff by the denial of his suppression motion in the criminal court.

In *Adamson v. Dayton Hudson Corp.*, 774 P.2d 478 (Okl. App. 1989), the Oklahoma Court of Appeals held that a finding of probable cause at an accused shoplifter's preliminary hearing barred her from relitigating the question of probable cause in a later suit for false arrest, when she had a "full and fair opportunity" to litigate the question of probable cause at the preliminary hearing. Similarly, in *Losee v. Dearinger*, 911 F.2d 48 (8th Cir. 1990), a passenger in a vehicle was arrested when the vehicle in which he was riding was stopped by the police and a search of the vehicle and its occupants uncovered shotguns and shotgun shells. Pre-trial and trial motions to suppress were filed on behalf of the passenger and were denied. The passenger was initially convicted on charges of possession of a firearm by a convicted felon. On appeal, however, **the conviction was reversed**, with the state appeal court finding that the officers did not have a reasonably articulable suspicion on which to base their investigatory stop of the car. The passenger then filed a federal civil rights action against the officers for violation of his Fourth Amendment rights.

The United States Court of Appeals for the Eighth Circuit held that the officers were entitled to qualified

immunity despite the reversal of the criminal conviction. The officers could only be liable, the court pointed out, if they should have known that their actions were unlawful. In the criminal case, two different trial judges denied pre-trial motions to suppress. The appellate court opined that it could not hold that the officers should have known their actions were improper when two judges trained in the law found their actions constitutionally permissible.

The United States Court of Appeals for the Ninth Circuit held that an arrestee was barred from going forward with his false arrest claims because of the determination, during his criminal trials, that no Fourth Amendment violations took place during his arrest. *Ayers v. City of Richmond*, 895 F.2d 1267 (9th Cir. 1990). In *Ayers*, *supra*, the claimant was arrested and charged with possession of marijuana and a concealed weapon in his automobile, as well as several other charges. He was arrested again and charged with possession of a concealed weapon and a loaded firearm. After the trial court denied the claimant's motions to suppress, he pled guilty to possession of a concealed weapon. He subsequently filed a civil rights action alleging false arrest. His false arrest claims were barred, the Ninth Circuit determined, since the question of probable cause was "fully and fairly" litigated in the criminal proceedings and the plaintiffs had the motivation to fully litigate the Fourth Amendment claims.

It is interesting to note that the *Ayers* court found that the finding of probable cause in conjunction with **motions to suppress** precluded plaintiff's claim for false arrest, when it could just have easily have found that the plaintiff's **conviction** on the criminal charges precluded him from asserting a false arrest claim. As noted previously in

this Memorandum, a criminal conviction, whether by trial or plea, constitutes an absolute defense to an action for false arrest. *Heck; Dukes v. State of New York*, *supra*; *Grochowski v. Commonwealth of Virginia*, *supra*; *Restrepo v. Fortunato*, *supra*; *O'Leary v. Luongo*, *supra*.

Until recently, the law in Louisiana as to the effect a conviction on criminal charges or a determination of probable cause in a criminal proceeding has on the accused's subsequent civil claim for false arrest was unsettled. The inapplicability of issue preclusion or collateral estoppel in Louisiana and the restrictive application of res judicata under the civil law rendered these defenses and theories unavailable, at least under the law as it existed prior to 1991, for the resolution of the issue. *See Vicknair v. Hibernia Building Corp.*, 479 So.2d 904 (La. 1985); *Safeco Ins. Co. of America v. Palermo*, 436 So.2d 536 (La. 1983); LSA-R.S. 13:4231 (prior to 1991 amendment).

In *Restrepo v. Fortunato*, 556 So.2d 1362 (La. App. 5th Cir. 1990), *writ denied*, 560 So.2d 11 (La. 1990), the court held that a plaintiff has **no cause of action** for false imprisonment based on the arrest for the crime for which he was **convicted**, as he cannot, as a matter of law, prove his detention was unlawful.[2] *See also*, *Thomas v. Frederick*, 766 F.Supp. 540 (W.D. La. 1991) (conviction serves as

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[2] *Cf. Touchton v. Kroger Co.*, 512 So.2d 520 (La. App. 3rd Cir. 1987) (Where a plaintiff alleges that police officers are liable for false arrest, the plaintiff bears the burden of proof to show that the arrest was made without probable cause and must allege detailed facts which show that the arrest was made without probable cause. This is an element of the plaintiff's cause of action. Where a plaintiff fails to allege specific facts from which it can be concluded that probable cause did not exist, the exception of no cause of action is properly granted.).

bar to action for false arrest or malicious prosecution, even though there is an unexercised right of appeal, and even where conviction was obtained by perjury or other fraud upon the court); *Rabalais v. Blanche*, 524 So.2d 772 (La. App. 3rd Cir. 1988) (guilty plea precludes malicious prosecution action). In *Williams v. DiVittoria*, *supra*, the United States District Court for the Eastern District of Louisiana held that the determination of probable cause in a **preliminary examination hearing does bar** a subsequent civil claim for false arrest under both the Civil Rights Act and state law, as the plaintiff is precluded, as a matter of law, from contesting the lawfulness of his arrest, detention, and prosecution.

Restrepo and *DiVittoria* were decided under the "old law" of res judicata as it existed prior to 1991. Prior to 1991, as noted above, the civil law and courts looked disfavorably upon res judicata (and the related doctrines of issue preclusion and collateral estoppel), and the Louisiana courts applied the bar of res judicata sparingly. However, the law pertaining to preclusion of claims was drastically changed by the passage of Acts 1990, No. 521, § 1. This amendment, which became effective on January 1, 1991, substantially broadened Louisiana's res judicata statute, LSA-R.S. 13:4231. The statute now provides as follows:

> **§ 4231. Res judicata**
>
> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final

> judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment;
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action;
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

As indicated by Comment (b) to the statute, res judicata has been liberally broadened to include the principle of issue preclusion, previously not recognized under Louisiana law. The official Comment makes the following observation: "R.S. 13:4231 also changes the law by adopting the principle of issue preclusion." Accordingly, under the current status of the law, in addition to there being no cause of action for false arrest, the doctrine of res judicata (including collateral estoppel and issue preclusion) operates to bar a false arrest claim when there has been a prior determination of probable cause on the charges.

Restrepo, DiVittoria, Heck, and LSA-R.S. 13:4231, as amended, are controlling with regard to the allegations of the present litigation that Rheams was falsely arrested on September 21, 2000. The undisputed facts of this case show that Judge Guidry issued a Warrant for the arrest of Rheams based on his finding of probable cause, the District Attorney's Office filed a Bill of Information against

Rheams charging him with two counts of attempted first degree murder, and the Grand Jury returned a no true bill against the officers. Accordingly, these prior determinations of probable cause bar Petitioners' claims of false arrest in the present action under the doctrine of res judicata.

IV. THE BILL OF INFORMATION IS PRIMA FACIE EVIDENCE OF PROBABLE CAUSE

As noted previously, the East Baton Rouge District Attorney's Office filed a Bill of Information against Rheams on October 16, 2001, charging him with two (2) counts of attempted first degree murder. It is respectfully submitted that this indictment precludes Petitioners' claims in the present litigation.

Under the majority rule, the filing of a bill of information is prima facie evidence of probable cause. "Prima facie probable cause" is established by the filing of a bill of information by the district attorney, but it is not conclusive evidence of probable cause. Prima facie probable cause may be rebutted by evidence that the bill of information was obtained by fraud, perjury, or other corrupt means. Restatement (Second) of Torts § 664(2) (1972); 52 Am.Jur.2d *Malicious Prosecution* § 117 (1970); 54 C.J.S. *Malicious Prosecution* § 35 (1948); Annotation, *Malicious Prosecution: Effect of Grand Jury Indictment on Issue of Probable Cause*, 28 A.L.R.3d 748, 753 (1969). *See also*, *Marcum v. Sagehorn*, 660 S.W.2d 426, 429 (Mo.App. 1983) (filing of bill of information by District Attorney is prima facie evidence of probable cause for prosecution); *Ulmer v. Associated Dry Goods Corp.*, 823 F.2d 1278, 1282 (8th Cir. 1987); *Stainer v. San Luis Valley Land & Mining Co.*, 166

F. 220 (8th Cir. 1908); *Cf. Gladding Chevrolet, Inc. v. Fowler*, 287 A.2d 280 (Md.App. 1972) (return of indictment by Grand Jury is prima facie evidence of probable cause); *Freides v. Sani-Mode Manufacturing Co.*, 211 N.E.2d 286 (Ill. 1965); *McMillian v. Johnson*, 878 F.Supp. 1473 (M.D.Ala. 1995); *Lumpkin v. Cofield*, 536 So.2d 62 (Ala. 1988); *Hardge-Harris v. Pleban*, 741 F.Supp. 764 (E.D. Mo. 1990); *Dukes v. City of New York*, 879 F.Supp. 335 (S.D.N.Y 1995); *Cox v. County of Suffolk*, 827 F.Supp. 935 (E.D.N.Y. 1993); *Bernard v. United States*, 25 F.3d 98 (2nd Cir. 1994); *White v. Frank*, 855 F.2d 956 (2nd Cir. 1988); *Gatter v. Zappile*, 67 F.Supp.2d 515 (E.D. Pa. 1999), *aff'd*, 225 F.3d 648 (3rd Cir. 2000); *Friedman v. U.S.*, 927 F.2d 259 (6th Cir. 1991); *Kelly v. Serna*, 87 F.3d 1235 (11th Cir. 1996); *Shepard v. Byrd*, 581 F.Supp. 1374 (N.D. Ga. 1984) (return of indictment immunizes arresting officer).

Where a claimant has been indicted on criminal charges, he must, in his complaint, plead facts showing fraud or other improprieties in the indictment proceedings in order to overcome the presumption of probable cause arising from his indictment. Should a claimant fail to allege fraud or other improprieties in the indictment process, his claims for false arrest must fail. *See Bernard, supra* at 104; *Lumpkin, supra* at 64. *See also Patterson v. J.M. Armatys*, 808 F.Supp. 550 (E.D. Tex. 1992).

Some courts have held that an indictment breaks the chain of causation of an arrestee's claim. In *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994), the Fifth Circuit held that the chain of causation for false arrest is broken by the return of an indictment by a grand jury, unless it can be shown that the deliberations of the grand jury were in some way tainted by fraudulent and corrupt practices of the defendant. The Fifth Circuit held in *Rodriguez v.*

Ritchey, 556 F.2d 1185 (5th Cir. 1977) (en banc), that even an officer who acts with malice in procuring a warrant or indictment will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary, such as a magistrate or grand jury, as that intermediary's "independent" decision to issue a warrant or return an indictment "breaks the causal chain and insulates the initiating party." *Id.* at 1193. *See also Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982); *Thomas v. Sams*, 734 F.2d 185, 191 (5th Cir. 1984); *Taylor v. Meacham*, 82 F.3d 1556, 1564 (10th Cir. 1996); *Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996) ("[C]hain of causation is broken by an indictment, absent an allegation of pressure or influence exerted by the police officers, or knowing misstatements made by the officers to the prosecutor."); *Senra v. Cunningham*, 9 F.3d 168, 173 (1st Cir. 1993).

Based on these authorities, the Bill of Information issued by the District Attorney's Office, as well as the no true bill returned by the Grand Jury clearing the officers of criminal wrongdoing, bars Petitioners' claims of false arrest and excessive force in the present action.

CONCLUSION

It is respectfully submitted that the various judicial and quasi-judicial findings of probable cause made in the criminal proceedings against Rheams conclusively establish the existence of probable cause for his arrest and the reasonableness of the force used by Deputy Marler and Trooper Poe in apprehending Rheams. For this reason, dismissal of the present action was warranted.

There were no extraordinary circumstances alleged in Petitioners' Petition for Writ of Mandamus filed in the Fifth Circuit, nor are any alleged in the Petition for Writ of Certiorari presently before this Court. In essence, Petitioners filed the mandamus proceeding in an attempt to bring the dismissal order before the Fifth Circuit Court of Appeals on an expedited basis. Delays are an unfortunate incident of the litigation process.

For the reasons set forth above, the ruling of the appellate court is correct. Accordingly, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

WALTER JAMES RHEAMS through his duly qualified curator, HELEN RHEAMS, TAMMY RHEAMS, individually JAMILAH MONET RHEAMS, through ALISHA MONIQUE THOMAS v. OFFICER VICTOR MARLER **********	CIVIL ACTION NO: 00-112-D-2 MIDDLE DISTRICT OF LOUISIANA UNITED STATES DISTRICT COURT JUDGE BRADY MAGISTRATE NOLAND

NOTICE OF APPEAL
TO FIFTH CIRCUIT COURT OF APPEAL
ON ALL ISSUES

(Filed April 11, 2002)

NOW INTO COURT, through undersigned counsel, come the Plaintiffs, who respectfully hereby give notice of appeal to the United States Court of Appeals for the Fifth Circuit, pursuant to the *Judgment* entered April 1, 2002, dismissing the above captioned matter in entirety.

The rulings from which this appeal is taken are all issues disposed of by the *Judgment*. There was no transcript made of any hearing affecting the *Judgment* at issue.

This appeal is taken by "all plaintiffs."

The parties to the judgment, orders or decrees appealed from and the names of and addresses of their respective attorneys are as follows:

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May this notice of appeal be deemed proper in the premises.

Respectfully submitted,

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CERTIFICATE

I hereby certify that I have caused the above and foregoing to be served on all counsel of record as listed below, this 8th day of April, 2002.

/s/ Donna U. Grodner
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